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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6000

RUSSELL B. HUGHES, JR.,

Petitioner

v.

CHARLES J. ROWE, et al.,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Russell B. Hughes Jr., by his appointed counsel, John Elson, Northwestern University Legal Clinic, asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53 of the Rules of the Supreme Court of the United States.

Petitioner has proceeded in forma pauperis in this cause in the federal district court for the Northern District of Illinois and in the United States Court of Appeals for the Seventh Circuit. The Court of Appeals has appointed the undersigned counsel to represent petitioner in his appeals (consolidated for oral argument) of the district court's dismissals of his habeas corpus and section 1983 challenges to prison officials' discipline of him. The Court of Appeals has

also transmitted to the undersigned counsel petitioner's written request that counsel file a petition for writ of certiorari to challenge the dismissal of his section 1983 complaint and the district court's award of attorney's fees against him.

Respectfully submitted,

John S. Elson

John S. Elson
Counsel for Petitioner
Northwestern University Legal Clinic
339 East Chicago Avenue
Chicago, Illinois 60611
312-649-8576

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AFFIDAVIT

I, Russell B. Hughes, Jr., being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

While a prisoner in the Illinois State Penitantiary at Joliet, I filed a pro se complaint in the federal district court for the Northern District of Illinois which challenged the constitutionality of the prison authorities' punishment

of me. My petition for certiorari seeks review of the United States Court of Appeals for the Seventh Circuit's affirmance of the district court's dismissal of my complaint and award of defendant's attorneys fees.

Russell B. Hughes Jr.
Russell B. Hughes Jr.

SIGNED and SWORN
to before me this
26 day of January, 1980.

Theodora Nijinski

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No. 79-6000

RUSSELL B. HUGHES, JR., Petitioner,

v.

CHARLES J. ROWE, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No.

RUSSELL B. HUGHES, JR., Petitioner,

v.

CHARLES J. ROWE, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The Petitioner, RUSSELL B. HUGHES, JR., by undersigned counsel petitions for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit, entered on July 17, 1979, affirming the decision of the United States District Court for the Eastern District of Illinois dismissing Plaintiff's complaint and awarding Defendant's attorney's fees.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not been reported and is set forth in the Appendix attached hereto at 12-15. The Seventh Circuit's denial of the petition for rehearing and suggestion for rehearing en banc is set forth at 16 and the opinion dissenting from said denial is set forth at 17. The opinion of the United States District Court for the Eastern District of Illinois dismissing Plaintiff's complaint has not been reported and is set forth in the Appendix at 2-8. The district court's orders awarding Defendant's attorney's fees are set forth in the Appendix at 10, 11.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit affirming the dismissal of Plaintiff's complaint and the award of Defendant's attorney's fees was entered on July 17, 1979, and the denial of the petition for rehearing and suggestion for rehearing en banc was entered on October 29, 1979, and corrected on November 6, 1979. The petition for writ of certiorari is timely filed within ninety days of that petition's denial. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED

1. May a state prison official be awarded attorney's fees under 42 U.S.C. section 1988 where the pro se prisoner's civil rights complaint raises substantial constitutional questions, but is dismissed for failure to meet strict fact pleading standards?

2. May a strict fact pleading standard be used to dismiss a prisoner's pro se civil rights complaint which raises claims similar to those that have been recognized by federal courts under established notice pleading standards?

STATUTES AND RULES INVOLVED

42 U.S.C. section 1988:

Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of the chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary

to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal causes is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

Federal Rule of Civil Procedure 8(a):

Claims for Relief.

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

STATEMENT OF THE CASE

The essential facts alleged in the pro se complaint to support plaintiff's claim of the denial of his fourteenth amendment rights to due process and equal protection of the laws are the following:

1. On September 20, 1977, Plaintiff and two companions, all inmates of the Illinois State Penitentiary at Joliet, were charged with being intoxicated in violation of prison regulations.

2. Although no violence nor disruption of prison routine resulted from the intoxication incident, Plaintiff was immediately placed in segregation until September 22,

on which date he was given a hearing before the Prison Adjustment Committee.

3. After the hearing the Adjustment Committee found the three inmates guilty and specified the following punishment: placement in segregation for thirty days, demotion to C grade, (maximum security), and for Plaintiff alone, loss of thirty days statutory good time. Despite the fact that Plaintiff had a better institutional disciplinary record than his two companions, the other two guilty inmates were not deprived of any good time credit. The only written reason given for Plaintiff's punishment was "threat to safety and security."

4. Two of the three prison officials who comprised the Adjustment Committee were biased against Plaintiff because Plaintiff had successfully prosecuted prison grievances against them for having wrongfully disciplined him.

After Plaintiff's administrative appeals of his punishment proved unsuccessful, he filed on December 12, 1977, a pro se complaint in federal district court for the Northern District of Illinois seeking declaratory and injunctive relief and damages. The complaint alleged claims under 42 U.S.C. section 1983 for violations of Plaintiff's civil rights committed by Defendant Illinois State Prison director Charles Rowe. On February 6, 1977, Plaintiff filed an amended pro se complaint which added other prison officials as defendants and stated the following major legal claims:[1]

[1]Plaintiff also alleged various other violations, mostly of state law and prison regulations, which Plaintiff now agrees were properly dismissed for lack of federal cognizance.

1. Punishing Plaintiff more severly than his two co-defendants, who had worse disciplinary records, violated equal protection of the laws;

2. Members of the Adjustment Committee were biased against Plaintiff because of his prior successful grievances against them;

3. Plaintiff's placement in segregation for two days prior to the hearing was unnecessary because no violence was involved in the rule infraction;

4. The written decision of the Adjustment Committee was inadequate because it did not give a sufficient statement of the reasons for the punishment.

The district court on June 28, 1978, dismissed Plaintiff's complaint for failure to state a claim for violation of the Constitution. (App. 1 - 8). The court gave the following reasons for the insufficiency of Plaintiff's major claims. The claim for denial of equal protection of the laws was dismissed because Plaintiff did not plead that he was a member of a discriminated against class. (App. 3-4). Plaintiff's allegation that his placement in segregation for two days prior to his hearing was "unnecessary" did not state a federal claim since, according to the district court, such temporary placement is authorized by prison regulation. (App. 6). Plaintiff's claim that his excessive punishment resulted from the bias of two members of the Adjustment Committee was insufficient first, because those members were not involved in the alleged offense, second, because Plaintiff admitted committing the offense and third, because the punishment was within authorized limits. (App. 6). Finally, Plaintiff's claim of the inadequacy of the written reasons given for his punishment—"threat to safety and security"—was dismissed because it was not arbitrary to conclude that

that Plaintiff's offense was a "threat to safety and security." (App. 5-6).

Thirty days after the complaint's dismissal, Defendant Rowe moved for an award of $400 in attorney's fees pursuant to 42 U.S.C. section 1988. The district court ordered Plaintiff to show cause within twenty days why such fees should not be awarded. (App. 9). Although Plaintiff filed a detailed pro se memorandum of law in opposition to the award of fees within the alloted time, the district court granted the Defendant's motion for fees on the ground that Plaintiff had not complied with or otherwise responded to the order to show cause. (App. 10). In denying Plaintiff's pro se motion to reconsider the fee award, the district court stated that the fees "will be taxed against the Plaintiff, as the suit was meritless." (App. 11).

After appointing counsel on appeal, the United States Court of Appeals for the Seventh Circuit affirmed both the dismissal of Plaintiff's complaint and the award of Defendant's attorney fees. (App. 12-15). The Court of Appeals concluded summarily that under the standards of Wolff v. McDonnell, 418 U.S. 539 (1974), Plaintiff was accorded the minimum due process to which he was entitled. (App. 13-14). In affirming the dismissal of Plaintiff's equal protection claim, the court acknowledged that under its prior decision in Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978) cert. denied, 439 U.S. 1121 (1978), a prisoner's complaint need not "articulate the presence of a suspect classification." The court reasoned, however, that this did not abolish "the requirement of elucidating an invidious classification" and that therefore Hughes failure to allege membership in any class falls short of even the relaxed pleading standards of Haines v. Kerner, 404 U.S. 519 (1972). (App. 14).

Finally, the court upheld the award of Defendant's attorney's fees, stating that "in cases such as the instant one, where no foundation for the claim has been shown, we feel compelled under Christianburg to uphold the decision of the district court." (App. 15)

In an en banc consideration of Plaintiff's Petition for Rehearing and Suggestion for Rehearing En Banc, the original panel voted to deny a rehearing and a majority of the active members of the court voted to deny a rehearing en banc. (App. 16). Voting to grant the suggestion for rehearing en banc were Chief Judge Fairchild, Judge Swygert and Judge Bauer. Judge Swygert also filed an opinion in support of his vote. (App. 17).

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The holding below that Plaintiff-prisoner must pay the Defendant-prison administrator's attorney's fees warrants the Court's review for two reasons. First, the liberal standard adopted below for awarding defendants' attorney's fees in pro se prisoner cases under section 1983, although a matter of first impression in the Supreme Court, contradicts the standard the Court has required for awarding defendants' attorney's fees under the provision of an analogous civil rights statute. See infra. 9-13. Second, by combining a liberal standard for awarding defendants' attorney's fees in prisoner civil rights cases with a strict fact pleading standard for dismissal of pro se prisoner complaints, the district and circuit courts below have made the federal court remedy at best a dangerous gamble and at worst a costly trap

for the unsophisticated. The extraordinary restriction on prisoner access to federal courts that would result from allowing prison officials to recover attorney's fees whenever prisoners failed to master strict fact pleading standards contradicts the explicit protection the Supreme Court has previously extended to pro se prisoner civil rights complainants.

Review by the Court is in addition warranted on the ground that the prisoner's pro se complaint was dismissed for failure to state a claim under Fed. Rules Civ. Proc. 12(b)(6), despite the fact that Plaintiff alleged facts and claims that are similar in all relevant respects to facts and claims in prisoner civil rights cases that federal courts have previously held to be sufficient to defeat Rule 12(b)(6) motion to dismiss. See infra. 12-14, 20-21. Because the standard to be applied to Rule 12(b)(6) motions to dismiss pro se prisoner civil rights complaints has caused division among and within the circuits and because the restrictive fact pleading standard applied below is contrary to the Court's specific prior admonitions requiring liberal pleading standards in such cases, the Court should now resolve the controversy over the appropriate pleading standard in pro se prisoner civil rights cases.

II. THE LIBERAL STANDARD USED BELOW TO AWARD DEFENDANT PRISON OFFICIALS' ATTORNEY'S FEES UNDER 42 U.S.C. SECTION 1988 CONFLICTS WITH THE INTENT OF CONGRESS AND WITH THE STRICT STANDARD REQUIRED BY THE SUPREME COURT UNDER AN ANALAGOUS ATTORNEY'S FEES STATUTE.

This case raises the question of whether federal courts can use the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. section 1988, (hereafter section 1988) to penalize prisoners for filing pro se civil rights suits which raise substantial, although ultimately unsuccessful, constitutional claims. Some federal courts, in order to reduce the burden

from the large number of civil rights suits have imposed a stricter pleading standard in such suits than is normally required. Rotolo v. Borough of Charleroi, 532 F.2d 920 (3rd Cir. 1976); Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977) cert. denied, 434 U.S. 1077 (1978). The district and circuit courts below not only applied such a standard, which itself is subject to challenge see infra. 20-26, but in addition, awarded Defendant's attorney's fees because of the Plaintiff's failure to meet their special pleading standard for pro se prisoner civil rights cases.

If prisoners are to be penalized in this way for good faith attempts to seek redress for violations of their constitutional rights in accordance with principles that have repeatedly been set forth by the Supreme Court, it is crucial that the Court now give prisoners fair notice of the new standards they will be required to meet. In the absence of such a thorough reevaluation of the Supreme Court's position on state prisoner access to federal court constitutional remedies, the Court's intervention is needed in order to halt the use of section 1988 as a means of both penalizing prisoners who fail in good faith efforts to vindicate their constitutional rights and intimidating those prisoners who would otherwise attempt to gain such vindication.

A. SINCE PLAINTIFF'S COMPLAINT RAISES SIGNIFICANT AND DIFFICULT CONSTITUTIONAL ISSUES, THE AWARD OF DEFENDANTS' ATTORNEY'S FEES CONFLICTS WITH THE "FRIVOLOUS, UNREASONABLE OR WITHOUT FOUNDATION" STANDARD OF THE SUPREME COURT IN CHRISTIANBURG GARMENT CO. v. E.E.O.C.

The liberal standard for awarding Defendant's attorney's fees used by the courts below conflicts with the strict standard that has been established by the Supreme Court and followed by most lower federal courts in the context of

civil rights cases with respect to non-prisoner plaintiffs. In Christianburg Garment Co., v. E.E.O.C., 434 U.S. 412 (1978), the Supreme Court held that a plaintiff in a Title VII case may be liable for the prevailing defendant's attorney's fees only if the action is "frivolous, unreasonable or without foundation . . . ." Id. at 419.[2]

The district court's explicit language reveals its failure to apply the Christianburg standard. The court initially awarded Defendant's attornev's fees on the grounds that Plaintiff had not responded to its rule to show cause why the fees should not be awarded. (App. 10). After it was pointed out in Plaintiff's pro se motion to reconsider the award that Plaintiff had indeed timely filed a brief in opposition to the rule, the district court denied reconsideration of its award on the grounds that the suit was "meritless." (App. 11). The Supreme Court specifically stated in Christianburg, however, that use of the term "meritless" in its common meaning of erroneous or incorrect is not acceptable. Instead, the term "meritless" is appropriate only if it is used in a qualified sense to as "to be understood as meaning groundless or without foundation, rather than simply that the Plaintiff has ultimately lost his case . . . ." Id. at 421.

Despite the absence of either such qualifying language in the district court opinion or of any reference to the Christianburg standard, the court of appeals apparently assumed that the district court had used "meritless" in the

---

[2]It will be demonstrated in section B. (infra. 15-19) that the Christianburg standard should be applied in pro se prisoner civil rights cases.

aforesaid qualified sense. (App. 15). Such an assumption is contrary to the position adopted by the Fifth Circuit, which has reversed awards of defendants' attorney's fees in civil rights cases for failure to use the explicit terminology set forth in Christianburg. Little v. Southern Elec. Steel Co., 595 F.2d 998, 1004 (5th Cir. 1979); Equal Employment Opportunity Comm. v. Datapoint Corp., 570 F.2d 1264, 1271-72 (5th Cir. 1978). The panel, nevertheless, affirmed the district court's award on the ground that "no foundation for the claim has been shown." (App.15). Analysis of the actual grounds for the dismissal, however, makes clear that the panel based its determination of the existence of the requisite foundation upon whether or not the complaint was sufficient to withstand a Rule 12(b)(6) motion to dismiss, and not, as Christianburg requires, upon whether the Plaintiff's claims were legally frivolous or unreasonable.[3] The substantial nature of Plaintiff's legal claims is manifest even in the opinions below, for, as Judge Swygert pointed out in his dissent from the denial of Plaintiff's petition for rehearing en banc,

> it is quite evident from the detailed treatment given by the district court to the issues raised by plaintiff's complaint that the suit was not groundless or meritless. The fact is corroborated by this court's treatment of the same issued on appeal.

App. 17.

---

[3]The alternative meaning of "no foundation," that there was an insufficient nexus between the actual and alleged facts, could not have been intended by the panel since Plaintiff had no opportunity before the complaint's dismissal to present the facts in support of his claim. See Risinger, Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rules of Civil Procedure 11, 61 Minn. L.R. 1, 52-57 (1976).

Most important, analysis of Plaintiff's major claims will demonstrate that they are in substance indistinguishable from claims which the Seventh Circuit, among other federal courts, has held sufficient to defeat motions to dismiss under Rule 12(b)(6). The logic of Christianburg and section 1988 is turned on its head by making a losing plaintiff pay defendant's attorney's fees when there is clear precedent to support the Plaintiff's claims.

This reversal of the intent of the Christianburg standard is most apparent in regard to Plaintiff's claim that Defendants' decision to discipline him more severely than his two equally guilty companions violated equal protection of the laws. The Seventh Circuit has held with respect to a similar claim of disciplinary prison discipline that "a state prisoner need not allege the presence of a suspect classification in order to state a claim under the equal protection clause . . . ." Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978), cert. denied, 439 U.S. 1121 (1978). Plaintiff's allegations of the differential discipline of identically situated inmates, would therefore, seem to state sufficient facts to support an equal protection claim. Even if there were some substance to the panel's unfathomable distinction between the necessity of "elucidating an invidious classification" (App. 14) and Durso's rejection of the requirement of "articulat[ing] the presence of a suspect classification," to hold that the pro se Plaintiff's failure to discover such a subtle distinction establishes that his complaint is "frivolous" or "unreasonable" is to destroy the significance of those terms as used in Christianburg.

The panel did not explain its rationale for upholding the dismissal of Plaintiff's due process claims, except to point out that his claims did not allege violations of the

standards required by Wolff v. McDonnell, 418 U.S. 539 (1974). (App. 13-14). Since Plaintiff's due process claims were substantially different from those decided in Wolff, the panel's holding in this regard failed to address the issues raised by Plaintiff, unless the Supreme Court had defined in Wolff the only types of due process violations possible in the prison context. Not only does Wolff itself belie this notion, 418 U.S. at 560, but after Wolff, the Seventh Circuit itself rejected a motion to dismiss a prisoner's procedural due process claim very similar to that alleged by Plaintiff. Thus, Plaintiff's claim that following his disciplinary infraction, which did not entail any violence or disruption of prison routine, he was placed in segregation for two days before being given a hearing falls squarely within the Seventh Circuit's holding in Hayes v. Walker, 555 F.2d 625, 629, 633 (7th Cir. 1977), cert. denied, 434 U.S. 959 (1978) Hayes proscribed exactly such temporary placement in segregation prior to a hearing, unless there is an emergency situation that requires temporarily foregoing the hearing in order to preserve the safety and integrity of the prison.

Similarly, Plaintiff's claim that the written reason given for his punishment—"threat to safety and security"—is too vague to meet due process requirements reflects the requirement of the Seventh Circuit, as well as of other federal courts, that there be "an adequate statement as to evidence relied on or reasons for the action taken" which is specific enough to "point[ ]out the essential facts upon which inferences were based . . . [to] ensure that prison officials will act fairly . . . (and to) protect against subsequent collateral effects based on misunderstanding of the initial decision." Hayes v. Walker, 555 F.2d 625, 633

(7th Cir. 1977), cert. denied, 434 U.S. 959 (1978). See also Green v. Nelson, 442 F.Supp. 1047, 1058 (D. Conn. 1977) (prison disciplinary record which contained only the three words "seriousness of offense" as to the basis for imposing disciplinary sanction was not specific enough to satisfy due process).

Finally, Plaintiff's due process claim that two of the three members of the Disciplinary Committee were fatally biased against him because Plaintiff had successfully prosecuted administrative grievances against them alleges sufficient facts on the basis of which Plaintiff could prove that the Committee did not have the requisite impartially.[4] See United States ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), cert. denied, 414 U.S. 1146 (1973); Wolff v. McDonnell, 418 U.S. 539, 570-71 (1974).

In sum, Plaintiff's claims closely follow claims repeatedly upheld by federal courts in the past. Even if it were permissable for the panel to apply a more restrictive pleading standard to Plaintiff's pro se complaint, its finding that the complaint was "without foundation" contradicts both the accepted meaning of that term and the Court's intent in Christianburg to apply a stricter standard to the award of defendant's attorney's fees than it applies to the award of plaintiff's attorney's fees.

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[4]The district court dismissed Plaintiff's bias claim because it was not alleged that the officers who imposed the discipline were personally involved in the incident in question. (App. 6). However, so limiting the requirement of impartiality to proscribe only personal involvement by the hearing officer is clearly wrong since it would countenance the imposition of discipline on the basis of arbitrary factors, such as the prisoner's race, religion, or as alleged here, his prior successful grievances against the decision-maker. Wolff, it is important to recall, found "no warrant in the record presented here for concluding that the Adjustment Committee presents such a hazard of arbitrary decision making that it should be held violative of due process of law," leaving open the possibility that proof of individual bias by members of an Adjustment Committee could constitute a violation of due process. 418 U.S. at 571 (emphasis added).

B. AN EXCEPTION FROM CHRISTIANBURG'S STRICT STANDARD FOR THE AWARD OF DEFENDANTS' ATTORNEY'S FEES SHOULD NOT BE MADE FOR PRO SE PRISONER CIVIL RIGHTS CASES.

Since substantial legal grounds thus support Plaintiff's claims, the justification for the award of Defendant's attorneys fees in this case depends upon whether a more liberal standard than that established in Christianburg should be applied solely because the complaint is that of a pro se prisoner alleging violations of his civil rights. There are three possible grounds for distinguishing the award of defendant's attorney's fees in prisoner civil rights cases from the award in Christianburg: first, the relevant statute in prison cases is 42 U.S.C. section 1988 rather than section 706(k) of Title VII; second, the defendant in prison cases is a state governmental officer rather than a private individual or corporation; and third, the plaintiff is a pro se prisoner rather than a federal governmental agency.

With regard to the first possible distinction, lower courts that have considered the question have held the Christianburg standard applicable under the similarly phrased section 1988, which applies to suits under 42 U.S.C. section 1983. Lopez v. Aransas County Independent School District, 570 F.2d 541, 545 (5th Cir. 1978); Olitsky v. O'Malley, 597 F.2d 303, 305 (1st Cir. 1979); Green v. Ten Eyck, 572 F.2d 1233, 1243-44 n.11 (8th Cir. 1978); McManama v. Lukhard, 464 F.Supp. 38, 41 (W.D.Va. 1978); but see, Kane v. City of New York, 468 F.Supp. 586, 591-92 (S.D.N.Y. 1979) (contrasting the analysis of the need to show bad faith in Christianburg and in legislative history of section 1988).

Indeed, the case for applying the Christianburg standard is even stronger under section 1988 than under Title VII since only under the former is there explicit congressional intent to apply a standard for the award of defendant's attorney's fees that is stricter than for the award of plaintiff's attorney's fees. See S.Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976); H.Rep. No. 1558, 94th Cong., 2d Sess. 6 (1976).

Neither can the fact that the Defendant below is a state official rather than a private individual or corporation justify a more liberal defendant fee standard than that allowed in Christianburg. One of the justifications set forth in Christianburg for allowing any attorney's fees for defendants was that of enabling smaller defendants to afford to contest frivolous claims. 434 U.S. at 422 n.20. It is untenable to argue, and was not argued by Defendant below, that the Attorney General of Illinois would represent state defendants in civil rights cases with any less vigor were he unable to recover attorney's fees against losing plaintiffs. Indeed, according to one federal court, even where the prisoner's civil rights complaint is clearly frivolous, Defendant's attorney's fees should be denied on the ground that the Defendant's attorney "is himself an employee of the state." Moss v. Ward, 434 F.Supp. 69, 72 (S.D.N.Y. 1977).

Finally, the fact that the Plaintiff below is a pro se prisoner is no justification for relaxing the Christianburg standard. Since a plaintiff federal agency, which may be presumed to possess a sophisticated knowledge of the law which it enforces, need pay defendant's attorney's fees only if its case is "frivolous, unreasonable or without foundation," it is nonsensical to make a pro se plaintiff liable for

attorney fees if he simply loses his case. Indeed, the appropriateness of even the restrictive Christianburg standard is suspect in the context of a pro se plaintiff, who cannot be expected to anticipate what a court might deem a frivolous or unreasonable claim.

The final and perhaps most troublesome rationale for relaxing the Christianburg standard in this case is that the greater the threat of an award of Defendant's attorney's fees, the greater will be the reduction in the oppressive volume of pro se prisoner civil rights cases in the federal courts.[5] Cf. Cruz v. Beto, 405 U.S. 319, 326-329 (1972) (Rehnquist, J. dissenting); Aldisert, Judicial Expansion of Federal Jurisdiction; A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 Law and Soc. Order 557, 575. The power that the Seventh Circuit decision below gives the state to minimize its burden of defending prisoner civil rights suits can hardly be overestimated. Because of the holding below a prisoner cannot rely on precedent in evaluating threats by prison officials that should he file or continue to prosecute his claims in federal court he will be assessed defendant's attorney's fees. The more serious and widespread the prisoner's grievances are, the more incentive the state will have to wield its attorney's fees club in order to deter the filing or continued prosecution of the more consequential complaints.

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[5]Defendant argued in the Court of Appeals below that he should be allowed attorney's fees because "(prisoner) cases represent a drain on the resources of the state and the court, and divert the efforts of the prision officials from duties which often benefit the prison system as a whole." Brief of Defendant-Appellee Charles J. Rowe et al., p.16.

Regardless of how aggressively the state decides to use this club in individual cases, the panel's liberal standard for awarding the state's attorney's fees creates for prisoners an indeterminate risk of substantial monetary liability that will intimidate many of them from seeking federal court redress for the violation of their constitutional rights. Moreover, the deterrent effect of the threat of attorney's fees will depend primarily on the extraneous factor of whether a particular prisoner has financial resources to protect against the possibility of such an award.

Even if great public expense might be saved as a result of the effect of the panel's liberal standard for awarding defendants' attorney's fees in deterring pro se prisoner civil rights suits, use of section 1988 to achieve such purpose is questionable. The purpose of section 1988 is not to reduce the litigation burden on state agencies and the federal courts; rather, it is to deter the state's violation of constitutional rights by encouraging litigation that will vindicate those rights. Carey v. Piphus, 435 U.S. 247, 258 n.11 (1978); see also Christianburg Garment Co., v. E.E.O.C., 434 U.S. 412, 422 (1978). The panel's liberal standard for awarding defendants' attorney's fees would reverse this congressional intent most drastically with respect to the vindication of prisoners' constitutional rights because prisoners' generally lack access to independent legal counsel, who can intelligently evaluate the efficacy of the defendant's attorney's fees threat.

Since the panel awarded fees in a case that is not frivolous, unreasonable or without foundation, the question of whether pro se prisoners should be held accountable even under the stricter standard of Christianburg need not arise

in this case. However, the special solicitude the Supreme Court has required lower federal courts in the past to give pro se prisoners' civil rights complaints evidences a strong judicial policy against using even the strict Christianburg fee standard in order to penalize prisoners who in good faith seek judicial redress for the violation of their constitutional rights. See Haines v. Kerner, 404 U.S. 519 (1972); Taylor v. Gibson, 529 F.2d 709, 713 (5th Cir. 1976).

Moreover, even if the Supreme Court were now to believe that its past liberality towards pro se prisoner pleadings were no longer appropriate, a change in such judicial policy should not be effected through the initiative of the lower federal courts. The Supreme Court's past encouragement of pro se prisoner civil rights actions is a major reason for the present volume of such cases. See Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L.R. 610, 629 (1979). To allow lower federal courts to use section 1988 in order to penalize prisoners for their justifiable reliance on the Supreme Court's past solicitude for the vindication of their constitutional rights would create inequity, confusion and disrespect for the judiciary. Such a significant change in judicial policy should not be allowed without the explicit sanction of the Supreme Court. Since such a change would contradict express congressional intent, it should not be allowed at all.

III. THE DISMISSAL OF PLAINTIFF'S COMPLAINT FOR FAILURE TO COMPLY WITH STRICT FACT PLEADING STANDARDS CONTRADICTS THE MODERN NOTICE PLEADING PRINCIPLES WHICH THE SUPREME COURT AND THE MAJORITY OF CIRCUITS HAVE APPLIED TO PRO SE PRISONER CIVIL RIGHTS COMPLAINTS.

Had the courts below applied the liberal pleading standards of Conley v. Gibson, 355 U.S. 41 (1957), and Haines v. Kerner, 404 U.S. 519 (1972), they could not have dismissed Plaintiff's complaint with prejudice under Fed. Rules Civ. Proc. 12(b)(6). As a brief review of Plaintiff's major claims reveals, the problems with the pro se complaint were not those of substance, but rather, those of style, mainly prolixity. Thus, Plaintiff did not explicitly "eludicat(e)... an invidious classification," (App. 14) as the panel rather enigmatically required in dismissing his equal protection claim. See supra. 12 . However, the complaint alleges facts showing not only that Defendants punished him more severely than the other identically situated inmates, but also that Defendants were biased against him because of his past successful resort to the constitutionally mandated prison grievance procedures, which would clearly supply an invidious basis for the imposition of harsher punishment. Wolff v. McDonnell, 418 U.S. 539, 557 (1974); Taylor v. Hayes, 418 U.S. 488, 501-503 (1974).

Second, in his claim of unconstitutional bias, although Plaintiff did not allege actual expressions of bias by the disciplinary committee, his allegations that bias resulted from his prior adversarial encounters with committee members clearly satisfied the Conley v. Gibson standard since on the basis of these allegations Plaintiff could prove a set of facts showing the actual bias that would entitle him to relief. 355 U.S. at 45-56.

Third, Plaintiff's allegation that he was placed in segregation for two days prior to his hearing in a non-emergency situation states the substance of a violation of procedural due process of law. Hayes v. Walker, 555 F.2d 625, 633 (7th Cir. 1977), cert. denied, 434 U.S. 959 (1978). Plaintiff's failure's to denominate the violation as such, although perhaps somewhat confusing, is not fatal under Conley. Finally, the force of Plaintiff's claim of the constitutional inadequacy of the reason given for his punishment-"threat to safety and security"-was weakened by Plaintiff's failure explicitly to link this claim with his allegations that no such threat in fact resulted. A competent lawyer undoubtedly would have remedied both this and the other aforesaid pleading inadequacies. However, Conley requires only that a complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," Id. at 47, and not that the complaint be concise forceful or eloquent.

The district and circuit court below thus did not apply the Conley v. Gibson liberal pleading standard to Plaintiff's complaint. They have thereby aligned themselves with the First and Third Circuits, which have explicitly refused to apply the Conley standard to civil rights complaints. Rotolo v. Borough of Charleroi, 532 F.2d 920 (3rd Cir. 1976); Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977), cert. denied, 434 U.S. 1077 (1978). This position conflicts with that of the rest of the circuits, all but two of which clearly require application of the Conley pleading standard to civil rights complaints, including those of prisoners. Dearman v. Woodson, 429 F.2d 1288 (10th Cir. 1970); Hudspeth v. Figgins, 584 F.2d 1345 (4th Cir. 1978), cert. denied, 99 S.Ct. 2013 (1979); Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967); Westlake v. Lucus, 537

F.2d 857 (6th Cir. 1976); Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974); Thomas v. Younglove, 545 F.2d 117 (9th Cir. 1976). Opinions in both the Second and Seventh Circuits reveal inconsistent positions on the application of the normal Conley pleading standard to civil rights complaints. Compare eg. Roberts v. Acres, 495 F.2d 57, 58-59 (7th Cir. 1974) and Escalera v. New York City Housing Authority, 425 F.2d 853, 857 (2nd Cir. 1970), cert. denied, 400 U.S. 853 (1970) with Duncan v. Nelson, 466 F.2d 939, 943 (7th Cir. 1972), cert. denied, 409 U.S. 894 (1972) and Ostrer v. Aronwald, 567 F.2d 551, 553 (2nd Cir. 1977).

The rationale for applying a stricter than normal pleading standard to civil rights complaints has been repeatedly set forth by the Third Circuit:

> In recent years there has been an increasingly large volume of cases brought under the Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendant—public officials, policemen and citizens alike, considerable expense, vexation and perhaps unfounded notoriety. It is important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.

Valley v. Maule, 297 F.Supp. 958 (D. Conn. 1968) quoted with approval in Kauffman v. Moss, 420 F.2d 1270, 1276 n.15 (3rd Cir. 1970) cert. denied, 400 U.S. 846 (1970) and in Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3rd Cir. 1976).

While the large volume of civil rights suits obviously adds to the burden on government, it also demonstrates the societal importance of the federal court remedy in protecting individual constitutional rights. Screening out frivolous suits through strict fact pleading requirements may reduce governmental burdens somewhat, but it will be at the cost of also screening out legitimate constitutional claims filed by laymen tho have not mastered the art of fact pleading.

Civil rights cases cannot be excepted from Professor Moore's observations that the "requirement that facts be pleaded is illusory and unsound, and results in a battle over the form of pleadings that does not advance that action to an adjudication on the merits." 2a Moore's Federal Practice ¶8.12, at 1690. The Tenth Circuit's rejection of specific fact pleading requirements in Title VII cases is equally applicable to the instant case: "Two reinstate this type of pleading, even in the limited circumstances here involved, is to directly contradict the spirit and purpose of Rule 8(a) and the general concept of modern federal pleading." United States v. Gustin-Bacon Div. Certain-Teed Products Corp., 426 F.2d 539, 542 (10th Cir. 1970) cert. denied, 400 U.S. 832 (1970). Having finally abandoned the technicalities of strict fact pleading for lawyers, courts should not reinstate such requirements for laymen who seek to protect their constitutional rights.

The conflict between reducing governmental burdens and maintaining meaningful citizen access to federal court remedies becomes sharpest when the complainant is a prisoner. On the one hand, some prisoners are likely to resort to federal court more than is objectively warranted both because of their lack of sophistication as to the limits of substantive federal court jurisdiction and because federal courts provide their only independent recourse from the state's power over them. On the other hand, prisoners' helplessness in the face of that power makes them particularly vulnerable to violations of their constitutional rights and therefore particularly in need of the protection federal courts are uniquely competent to give. See Federal Judicial Center, Prisoner Civil Rights Committee, Recommended Procedures for Handling Prisoner

Civil Rights Cases in Federal Courts (tent. draft 1977) 7-8; Doyle (Judge for the United States District Court, Western District of Wisconsin), The Court's Responsibility to the Inmate Litigant, 56 Judicature, 406 (1973); Goldsby v. Carnes, 365 F.Supp. 395, 398-99 (W.D.Mo. 1973); see also Wolff v. McDonnell, 418 U.S. 539, 555-58 (1974).

The most satisfactory approach to the dilemma posed by the pro se prisoner civil rights complaint has been stated by the Fifth Circuit:

> "We are aware that a large number of prisoner suits are predicated primarily upon the prisoner's boredom and resentment of authority, and upon investigation are found to lack substantial basis in fact. [footnote omitted] But judges must balance their misgivings and skepticism about the usual §1983 prisoner suit against the cold knowledge that in certain instances injustices to prisoners occur in jails and prisons, some of which violate constitutional mandates. Sometimes practices are uncovered shocking even to those most unsympathetic to prisoner rights. Section 1983 in such instances offers the only practical remedy available to the prisoner in such a system; it is the responsibility of the courts to be sensitive to possible abuses in order to ensure that prisoner complaints, particularly pro se complaints, are not dismissed prematurely, however unlikely the set of facts postulated. An opportunity should be provided the prisoner to develop his case at least to the point where any merit it contains is brought to light."

Taylor v. Gibson, 529 F.2d 709, 713 (5th Cir. 1976). The Fifth Circuit's approach, contrary to that of the Third and First Circuits and that of the Seventh Circuit below, is in accordance with the Court's past admonitions requiring liberal construction of pro se prisoner civil rights complaints. Haines v. Kerner, 404 U.S. 519 (1972); Estelle v. Gamble, 429 U.S. 97 (1976).

Were the federal courts about to collapse under the weight of pro se prisoner civil rights cases perhaps a retrenchment on the liberality of Haines might warrant consideration. However, not only is the burden unremarkable,

see Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L.R. 610, 637 (1979); Bailey, The Realities of Prisoners' Cases under 42 U.S.C. Section 1983: A Statistical Survey in the Northern District of Illinois, 6 Loyola U. of Chicago L.R. 527, 544-45 (1975), but, there are also pre-trial methods for weeding out insubstantial claims that are far more efficient and fair than dismissing with prejudice those complaints that do not plead the requisite number of facts nor link the facts that are pleaded explicitly enough with the constitutional rights violated. This point was effectively made by the Ninth Circuit in a pro se prisoner civil rights case not unlike the instant case:

> Failure, in an initial complaint, to set forth the claim by means of a short and plain statement, as required by Rule 8(a)(2), is not a ground for dismissal of an action with prejudice, since there are procedures available for correcting a vague or prolix complaint. See Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 235, 79 S.Ct. 760, 3 L.Ed.2d 770. Among such available procedures are those provided for in Rule 12(e), Federal Rules of Civil Procedure (motion for a more definite statement); Rule 12(f) (motion to strike portions of the pleading); Rule 15 (right to amend); Rule 16 (pre-trial procedure and formulation of issues); Rules 26-37 (depositions and discovery)

DeWitt v. Pail, 366 F.2d 682, 685 (9th Cir. 1966) (footnote omitted); See also Wright and Miller, Federal Practice and Procedure, §1202 p.60 (1969).

Finally, the fact pleading standard of the courts' below may even backfire. In order to attempt to comply with this standard prisoners are likely to file excessively detailed and lenghty complaints, thereby increasing the ultimate burden on the federal courts. Mr. Justice Steven's observation in his dissent in Estelle v. Gamble, 429 U.S. 97, 114

(1976), has special force in the context of the restrictive pleading standard of the courts below, for the burdens they add to the task of the pro se pleader will principally benefit not "federal judges, very little of whose time will be saved, but rather the 'writ-writers' within the prison walls, whose semiprofessional services will be in greater demand."

The Supreme Court's review of the dismissal of Plaintiff's complaint is thus warranted for three reasons: to resolve the disagreement among the circuits over the proper pleading standard in pro se prisoner civil rights cases; to stop the unfairness of having lower courts dismiss pro se prisoner complaints on the basis of a pleading standard that is more restrictive than the federal rules and the Supreme Court have authorized for any complaints, much less for those of laymen; and to eliminate the contradiction between society's need for a meaningful federal remedy to protect prisoners' constitutional rights and the courts' use of a strict fact pleading standard to prevent prisoners from gaining a meaningful hearing on their constitutional claims.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that his Petition for a Writ of Certiorari be granted.

Respectfully submitted,

_____
John S. Elson
One of the attorneys for Petitioner

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Cynthia Gray and Thomas Sobecki,
Northwestern University Law School
students assisted in the preparation
of this petition.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF I
EASTERN DIVISION

DOCKETED

Name of Presiding Judge, Honorable THOMAS R. McMILLEN

Cause No. 77 C 4583

Date JUNE 28, 1978

Title of Cause HUGHES v. ROWE et al.

Brief Statement of Motion

JUL 1

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

JUN 28 1978

Reserve space below for notations by minute clerk

Motions to dismiss submitted by defendant Rowe & by the other eleven defendants are granted because plaintiff has failed to state a claim for violation of the Constitution of the United States. All other motions are denied as moot. Enter Rule 58 judgment. (Decision att.)

Send this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

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NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RUSSELL BENJAMIN HUGHES,

Plaintiff,

v.

CHARLES J. ROWE, DENNIS J. WOLFF, LORRAINE KAMMERMAN, DOLORES A. PELLEGRINI, SOL LEVENSON, GEORGE STAMPAR, WALTER LOCKHART, GAYLON YATES, DENNIS BECRAFT, RAYMOND MATUSZEWSKI, WILLIE ESTERS and JOHN LEANDER,

Defendants.

NO. 77 C 4583

M

DECISION ON DEFENDANTS' MOTIONS
TO DISMISS OR FOR SUMMARY JUDGMENT

Plaintiff Hughes has filed this § 1983 action pro se naming as defendants Charles Rowe, Director of the Illinois Department of Corrections; Dennis Wolff, Warden at Joliet Correctional Center; three members of the Department of Corrections' Administrative Review Board, Kammerman, Pellegrini, and Levenson; Stampar and Lockhart, members of the Adjustment Committee which held plaintiff's disciplinary hearing; and Becraft, Yates, Matuszewski, Esters and Leander,

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who have served on various Institutional Inquiry Boards at the penitentiary which have reviewed plaintiff's grievances.

Plaintiff's complaint and amended complaint stem from the disciplinary sanctions imposed on him as the result of his infraction of prison rules on September 20, 1977. On that date, plaintiff was "written up" for suspected intoxication. Two other inmates were also involved in the incident. At the Adjustment Committee's hearing on the incident two days later, plaintiff admitted that he had been drinking. He was given 30 days in segregation, demoted to C grade, and lost 30 days good time. (Plaintiff does not request relief for lost good time in this action; he has filed a petition for writ of habeas corpus on this issue, Case No. 78 C 372.)

Numerous motions have been filed in this case, some of which we addressed in our decision of February 23, 1978. Our instant decision granting defendants' motion to dismiss or for summary judgment filed April 27, 1978 will resolve all other motions pending in this case.

First, plaintiff claims that he was denied equal protection because the two other intoxicated inmates did not lose good time. Plaintiff does not state that he was a member of a class which

was discriminated against in favor of another class. Therefore he has failed to allege a necessary element of an equal protection claim under the Fourteenth Amendment.

Secondly, plaintiff has failed to allege facts which would give rise to a claim of cruel and unusual punishment under the Eighth and Fourteenth Amendments. In order to make this determination, we must consider whether under all the circumstances the punishment is appropriate to the crime. Covington v. Sielaff, 430 F.Supp. 562 (N.D. Ill. 1977).

Plaintiff admits that he has an alcohol problem. Additionally, plaintiff acknowledged to the Adjustment Committee that he was in fact guilty, thereby leaving no doubt as to whether he actually did infringe prison rules. The Administrative Regulations in effect at the time of the hearing authorized the demotion to C Grade, transfer to segregation, and loss of good time. (A.R. 811(II)(B) and 804(II)(B)(10)(e) effective October 1, 1975 and A.R. 804(II)(B)(10)(f) effective June 18, 1976.) We also note that the current Administrative Regulations provide that use of intoxicants warrants 180 days in C grade; three months maximum loss of good time; and a maximum of 30 days in segregation. (A.R. 804(II)(A)(1)(9).) Although this regulation became effective after the disciplinary action in question, it indicates

what the Department of Corrections considers appropriate for that offense. Taking all these facts into consideration, we conclude that the punishment meted out was not so severe as to shock one's sense of decency nor was it even disproportionate to the offense. See Little v. Walker, 552 F.2d 193, 197 (7th Cir. 1977), cert. den. 46 U.S.L.W. 3586.

Finally, we find and conclude that plaintiff has failed to state a claim for deprivation of due process at the disciplinary hearing and thereafter. Under Wolff v. McDonnell, 418 U.S. 539 (1974), plaintiff is entitled to certain procedural safeguards in connection with his disciplinary hearing. In our view, he was provided those safeguards. He received written advance notice that he was being charged with intoxication on a certain date, at a certain time, in a certain place. We therefore deem it unnecessary for him to have been apprised of the number of the rule which he was found to have violated.

Furthermore, since he admitted guilt and asked for no witnesses, we deem it unnecessary for the Adjustment Committee to have called witnesses. We further find that the Adjustment Committee did not act arbitrarily or capriciously in concluding that plaintiff's offense was a "[t]hreat to safety & security." (Ex. B-5 to Defendants' Memorandum in Support of Motion to Dismiss

or for Summary Judgment, filed May 3, 1978). See Aikens v. Lash, 514 F.2d 55, 60-61 (7th Cir. 1975). We accept the Department of Corrections' apparent conclusion that intoxication is a serious offense.

Plaintiff complains that his placement in segregation between the evening of September 20 and his hearing on September 22 was "unnecessary" because no violence was involved in the incident. We find that his temporary placement in segregation pending the hearing, which was brought within the required 72 hour period, is not actionable. See A.R. 804(C), effective December 1, 1976.

Plaintiff further alleges that the Adjustment Committee hearing his case was not impartial because he had previously filed grievances against two of its officer members. But neither officer was himself involved in the intoxication incident. Since plaintiff admitted to being intoxicated and because the punishment imposed was within the limits of the regulations then in effect, we find that plaintiff has failed to state a claim on this issue.

Plaintiff's allegation that he was removed from his assignment without the recommendation of the Adjustment Committee also fails to state a claim because an inmate has no protectable

property or liberty interest in a particular assignment. See Bryan v. Werner, 516 F.2d 233, 240 (3d Cir. 1975.)

Finally, plaintiff's allegation that he had not received notice of his demotion to C grade until nearly one month after he was demoted states no claim in view of the fact that the Adjustment Committee's recommendation of demotion was clearly stated on the resident information sheet following the disciplinary hearing.

On January 23, 1978, defendant Rowe filed his motion to dismiss and for summary judgment. He renewed this motion on March 6, 1978 in his Reply to Court's Order, alleging that plaintiff had failed to allege more than a claim of respondeat superior against Rowe, and alternatively asserting that plaintiff had failed to state a constitutional deprivation. Plaintiff has alleged personal knowledge and involvement of Rowe by virtue of the fact that Rowe wrote to Hughes, expressing his approval of the Adjustment Committee's sanctions. We will grant Rowe's motion, however, because plaintiff has failed to state a constitutional claim, as is discussed above.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motions to dismiss submitted by defendant Rowe and by the other

eleven defendants are granted because plaintiff has failed to state a claim for violation of the Constitution of the United States. All other motions are denied as moot. Enter Rule 58 judgment.

ENTER:

JUDGE, U. S. DISTRICT COURT

DATED: June 28, 1978

...COURT, NORTHERN DISTRICT OF ILL.
EASTERN DIVISION

KETED

Name of Presiding Judge, Honorable THOMAS R. MACKEN

Cause No. 77 C 4583 Date AUG. 7, 1978

Title of Cause RUSSELL B. HUGHES v. CHARLES J. ROWE et al.

Statement of Motion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

AUG 9 1978

Reserve space below for notations by minute clerk

Plaintiff is ordered to show cause within twenty (20) days hereof why defendants' attorneys' fees in the amount of $400 should not be taxed against plaintiff under 42 U.S.C. §1988.

...d this memorandum to the Clerk.
...nsel will not rise to address the Court until motion has been called.

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DOCKETED

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILL. APPENDIX p.10
EASTERN DIVISION

Name of Presiding Judge, Honorable THOMAS R. McMILLEN

Cause No. 77 C 4583 Date OCT. 18, 1978

Title of Cause RUSSELL B. HUGHES v. CHARLES J. ROWE et al.

Brief Statement of Motion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

On August 7, 1978, we ordered plaintiff to show cause within twenty (20) days thereof why defendants' attorneys' fees in the amount of $400 should not be taxed against plaintiff under 42 U.S.C. §1988.

OCT 20 1978

Because plaintiff has not complied with or otherwise responded to that order, we hereby tax defendants' fees in the amount of $400 against him pursuant to 42 U.S.C. §1988.

ENTER:

Thomas R. McMillen

JUDGE, U. S. DISTRICT COURT

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
DOCKET EASTERN DIVISION

Name of Presiding Judge, Honorable THOMAS R. McMILLEN

Cause No. 77 C 4583 Date December 5, 1978

Title of Cause HUGHES, JR. v. CHARLES J. ROWE, et al

Brief Statement of Motion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

DEC 7 1978

Reserve space below for notations by minute clerk

On October 18, 1978, we ordered that the defendants' attorneys fees in the amount of $400 should be taxed against the plaintiff pursuant to 42 U.S.C. §1988. Plaintiff has filed a motion to reconsider said action. Plaintiff's motion to reconsider is denied and attorneys fees in the amount of $400 will be taxed against the plaintiff, as the suit was meritless.

Thomas R. McMillen

#3

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

UNITED STATES COURT OF APPEALS

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

For the Seventh Circuit

Chicago, Illinois 60604
Argued May 30, 1979

July 17, 1979

Hon. Wilbur F. Pell, Jr., Circuit Judge

Hon. Walter P. Gewin, Senior Circuit Judge*

Hon. Harlington Wood, Jr., Circuit Judge

RUSSELL B. HUGHES, JR., Plaintiff-Appellant,	)	Appeals from the United States District Court for the Northern District of Illinois,
Nos. 78-2155 & 79-1129 (consolidated)	)	Eastern Division
vs.	)	No. 77 C 4583
CHARLES J. ROWE, et al., Defendants-Appellees.	)	Thomas R. McMillen, Judge

O R D E R

Appellant Russell B. Hughes appeals in forma pauperis from the district court's dismissal of his pro se complaint filed under 42 U.S.C. § 1983. Hughes alleges an abridgement of his constitutional rights of due process and equal protection. Appellee filed a motion for attorney fees. The motion was granted on the ground that the suit was meritless. The appeal of this ruling was consolidated with Hughes' earlier appeal of his § 1983 complaint. We affirm the district court's decision in both appeals.

*United States Senior Circuit Judge for the Fifth Circuit, sitting by designation.

On September 20, 1977 appellant, an inmate at Joliet Correctional Center, was charged with suspicion of being intoxicated and drinking homemade liquor and placed in the segregation cellhouse. Two days later a disciplinary hearing was held before the Institutional Adjustment Committee. Appellant admitted his guilt. The committee recommended the imposition of ten days segregation confinement, demotion to C grade status and the loss of thirty days statutory good time. 1/ The basis for the sanctions imposed by the committee was the "threat to safety and security." After release from segregation, appellant was reassigned to another job. Appellant filed numerous grievances and appeared before the Administrative Review Board. His grievances were denied.

Appellant alleges numerous violations of his due process rights by prison officials stemming from the September 20th incident. After carefully reviewing each of his allegations the district court concluded that his pro se complaint failed to state a cause of action.

The Supreme Court has delineated the standard to be applied in determining whether a prisoner has been afforded his minimum due process rights. Wolff v. McDonnell, 418 U.S. 539, 41 L.Ed.2d 935 (1974). The prisoner is entitled to (1) advance written notice of the charges against him or her; (2) an opportunity to call witnesses and present documentary evidence, provided that to do so will not jeopardize institutional safety or correctional goals, before a sufficiently impartial hearing board; (3) a written statement by the fact finder of "the evidence relied upon and reasons for the disciplinary action taken."

1/ Hughes filed a pro se habeas corpus petition wherein the court considered his challenge to his loss of good time as a result of the September 20 incident. The court granted a motion to dismiss and the cause styled No. 78-2058 is before this court on appeal.

We have considered each of the alleged infirmities presented by appellant in his pro se complaint. Viewing each of his allegations under the standard enunciated in Wolff, we are compelled to conclude that Hughes was accorded the minimum due process to which he was entitled.

Appellant also maintains that the court erred in dismissing his equal protection claim. The court specifically found that Hughes had failed to state that "he was a member of a class which was discriminated against in favor of another class."

This court has previously stated in Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1971), that "[t]he gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action." Id. at 1052. Appellant seems to argue that he need not allege membership in a class that was discriminated against in favor of another class. In support of his position Hughes relies on Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978).

However, Hughes' reliance on Durso is misplaced. Therein we explained that a prisoner need not articulate the presence of a suspect classification or the infringement of a fundamental right to effectively state a valid claim under the Equal Protection Clause. However, our ruling did not abolish the requirement of elucidating an invidious classification to adequately state a cause of action. Hughes failed to allege that he was a member of any class, maintaining only that he received a harsher punishment than two other prisoners who were involved in the same incident. Such a bare assertion falls short of even the relaxed standard of pleading prescribed by the Supreme Court in Haines v. Kerner, 404 U.S. 519 (1972). Adhering to the same principles controlling Heyburn v. Milwaukee County, 504 F.2d 1189, 1196 (7th Cir. 1974), it is clear that appellant has failed to allege a claim that would entitle him to relief.

The final issue raised by appellant is whether the court abused its discretion by awarding attorney's fees. The appropriate standard to be applied in considering this issue has been ununciated by the Court in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Therein Justice Stewart, speaking for a unanimous court 2/ specifically sanctioned the standard of "meritless" in granting attorney's fees to a prevailing defendant. The Court qualified the meaning of meritless to be groundless or without foundation. Id. at 421.

In applying this criteria to the instant case, we are unable to conclude that the court abused its discretion in awarding attorney's fees. Although reluctant to award attorney's fees against pro se plaintiffs, in cases such as the instant one, where no foundation for the claim has been shown, we feel compelled under Christiansburg to uphold the decision of the district court.

For the above reasons, the judgment of the district court is AFFIRMED.

2/ Justice Blackmun took no part in the consideration or decision in the case.

CORRECTED

11/6/79

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 29, 1979

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. WALTER P. GEWIN, Senior Circuit Judge*

RUSSELL B. HUGHES, JR.,
Plaintiff-Appellant,

Nos. 78-2155, 79-1129 vs.

CHARLES J. ROWE, et al.,
Defendants-Appellees.

Appeal from the United States Court for the Northern District of Illinoi
Eastern Division
No. 77 C 4583
Thomas R. McMillen, Judge

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellant, Russell B. Hughes, Jr., a vote of the active members of the court was requested, and a majority of the active members of the Court have voted to deny a rehearing en banc.** All of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Honorable Walter P. Gewin, Senior Circuit Judge for the Fifth Circuit is sitting by designation.

** Judges Fairchild, Swygert, and Bauer voted to grant the suggestion for rehearing en banc.

Judge Swygert also filed the following statement:

FPI-81—8-7-73-208-484

SWYGERT, Circuit Judge. On June 28, 1978 the district court entered judgment for defendants. In deciding the issues, the district judge wrote a seven-page opinion. He granted motions to dismiss filed by defendants because in his pro se complaint plaintiff "failed to state a claim for violation of the Constitution of the United States."

On July 28, 1978 defendant Rowe moved the district court to award him reasonable costs and attorney's fees pursuant to 42 U.S.C. § 1988. The district court thereupon ordered the plaintiff to show cause within twenty days why attorney's fees in the amount of $400 should not be taxed against him. The court entered an order on October 18 reading as follows:

> Because plaintiff has not complied with or otherwise responded to that order, we hereby tax defendant fees in the amount of $400 against him pursuant to 42 U.S.C. §1988.

Although defendant, in a memorandum supporting his request for attorney's fees, alleged that plaintiff's claim of a violation of his constitutional rights was "unfounded, meritless or frivolous, and was vexatiously brought," the district judge made no finding either in his decision which preceded the entry of the judgment dismissing the action or when he made the award of attorney's fees that the action was either meritless or groundless. It was only after plaintiff had filed a motion to reconsider the award of attorney's fees that the district court in a denial of the motion stated that the motion was denied because "the suit was meritless."

In affirming the district court, this court discussed the allegations of the complaint in light of three of our decisions and then held that "it is clear that plaintiff has failed to allege a claim that would entitle him to relief." Thus, neither the district court nor this court in deciding that plaintiff's complaint failed to state a claim, found that the claim was "frivolous, unreasonable, or groundless."

It is my view that under the circumstances of this case, the district court did not satisfy the requirements of Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), that an award of attorney's fees can be made only on a finding that the claim is groundless or that it comes within the ambit of other talismanic words listed in that decision. It is quite evident from the detailed treatment given by the district court to the issues raised by plaintiff's complaint that the suit was not groundless or meritless. That fact is corroborated by this court's treatment of the same issues on appeal.